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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO MORALES CONTRERAS, Defendant and Appellant.	H044218 (Santa Clara County Super. Ct. No. C1239884)

A jury convicted defendant Ernesto Morales Contreras of committing nine sex offenses against his stepdaughter. The trial court sentenced defendant to an aggregate prison term of 75 years to life consecutive to 25 years. On appeal, defendant challenges the sufficiency of the evidence supporting one of his convictions, raises a claim of sentencing error, and contends there is a clerical error in the abstract of judgment. Finding no reversible error, we affirm the judgment. Because we agree with defendant that the abstract of judgment contains an error, we direct the superior court to correct it.

I. BACKGROUND

A. Factual Summary

A. was born to mother in June 1998. When A. was about four years old, mother began dating defendant. A year later, in 2003, mother and defendant got married. Defendant, who was born in 1982, was then in his early 20s. Mother and defendant had two sons together.

A. was a 17-year-old recent high school graduate at the time of the June 2016 trial. She testified that defendant had molested her for several years, beginning no later than when she was eight years old. Defendant would touch her vagina with his hand as often as two or three times a week, generally while holding her down with his other hand or his body weight. Defendant began touching A.'s breasts under her clothing when she was 10 years old and in the fifth grade. Defendant also would make A. stroke his penis, lick A.'s vagina once or twice a week, rub his penis in between her butt cheeks, rub his penis on her vagina, and attempt to penetrate her vagina with his penis. He would ejaculate on her after rubbing his penis against her. Defendant would ignore A. when she told him to stop. If she cried, he would cover her face with a pillow or blanket. A. testified that these molestations generally occurred at home in the afternoon before her mother got home, while her brothers were outside or in another room.

Two or three times, defendant made A. orally copulate him. He would take her out of the house in the evening (purportedly to run errands), park the car somewhere dark, grab her by the neck or head, and force her mouth onto his penis.

Defendant repeatedly told A. that if she told anyone about the abuse he would go to jail and be separated from her half-brothers. She interpreted those comments as "disguised threat[s]" because she loved her half-brothers.

In 2009, A. told mother about the abuse, but immediately retracted the accusation.[1] A. told a close friend about the molestations during the summer of 2012, shortly before she started high school. That friend attended the same high school as A. and told their principal about the abuse after school started in August. A. confirmed that defendant was molesting her when the principal confronted her. The school contacted San Jose Police.

[1] At trial, A. could not recall exactly what she told mother; she simply recalled "bringing it up" and that she did not give mother "details of everything." Mother testified that A. said defendant had tried to touch her breast.

The responding officer interviewed A. at school on August 29, 2012. The officer testified that A. said defendant had been molesting her since before she was eight years old. She said he had touched her breasts and vaginal area with his hand and had rubbed his penis against her vaginal area. She said all these touchings were skin-to-skin. A. also told the officer that defendant had tried to penetrate her vagina with his penis but had failed, had orally copulated her "more than 20 times," and had forced her to orally copulate him two or three times.

A. testified that she saw defendant touch her half-brothers' penises and testicles when the boys were approximately three and eight years old. These touchings occurred when the boys were naked after bathing. She testified that the boys understood it as a joke and would laugh. The older half-brother, L., testified at trial, at which time he was 12 years old. He testified that defendant had touched his penis and testicles more than once, which made him uncomfortable. Defendant would stop when L. told him to. L. testified that he saw defendant touch his younger brother's privates as well. Mother testified that she saw defendant touch L.'s privates a few times. She told him not to do it because, while "it may be normal in Mexico," it wasn't normal here.

B. Procedural History

Defendant was charged by felony complaint on August 31, 2012. The case went to trial in June 2016. On June 22, 2016, after the close of evidence, the Santa Clara County District Attorney filed the operative first amended information. It alleged that defendant committed the following crimes against A.: two counts of oral copulation with a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b); counts 1-2)[2]; aggravated sexual assault by rape of a child under 14 years of age and 7 years younger than defendant (§ 269, subd. (a)(1); count 3); aggravated sexual assault by sodomy of a child under 14 years of age and 7 years younger than defendant (§ 269, subd. (a)(3); count 4); two counts of aggravated sexual assault by oral copulation of a child under

[2] All further statutory references are to the Penal Code unless otherwise noted.

14 years of age and 7 years younger than defendant (§ 269, subd. (a)(4); counts 5-6); and three counts of lewd and lascivious conduct on a child by force, violence, duress, menace, and fear (§ 288, subd. (b)(1); counts 7-9). The first amended information also alleged that defendant had committed lewd and lascivious acts on A.'s half-brothers, both children under age 14 (§ 288, subd. (a); counts 10 and 11). Multiple victims were alleged for counts 7 through 11. (§ 667.61, subds. (b) & (e)).

The jury returned its verdicts after deliberating for approximately one-and-a-half days. The jury found defendant guilty of counts 1, 2, 3, 5, 6, 7, 8, and 9. The jury found defendant not guilty of count 4 (aggravated sexual assault by sodomy), but guilty of the lesser included offense of attempted aggravated sexual assault of a child under age 14 and 7 years younger than defendant (§§ 269, subd. (a)(3), 664). Finally, the jury found defendant not guilty of counts 10 and 11, involving A.'s half-brothers.

On November 10, 2016, the trial court sentenced defendant to a total term of 75 years to life consecutive to 25 years. The aggregate sentence consists of five consecutive 15-year-to-life terms on counts 1, 2, 3, 5, and 6; the middle term of seven years on count 4; and three consecutive six-year terms on counts 7, 8, and 9.

II. DISCUSSION

A. Sufficiency of the Evidence as to Count 3

Defendant was convicted in count 3 of aggravated sexual assault by rape of a child under 14 years of age and 7 years younger than defendant (§ 269, subd. (a)(1)). The elements of that crime are (1) sexual intercourse with a non-spouse; (2) against the victim's will by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another"; (3) a victim under 14 years old; and (4) a defendant at least 7 years older than the victim. (§§ 269, 261, subd. (a)(2).) Defendant argues that the evidence was insufficient to prove the first element, sexual intercourse, because A. testified (and told police) that defendant never put his penis inside her vagina. However, A. also testified (and told police) that defendant rubbed his penis on her vagina

and tried to penetrate her vagina, but failed. Because jurors reasonably could have inferred from that evidence that defendant's penis penetrated the lips of A.'s vagina, his conviction on count 3 is supported by substantial evidence.

1. Standard of Review

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

2. Legal Principles

Vaginal penetration is not necessary to commit a rape. "Any sexual penetration, however slight, is sufficient to complete the crime" of rape. (§ 263.) "Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8; CALCRIM No. 1000 [instructing that, in the context of rape, "[*s*]*exual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis"].)

3. Analysis

A. testified that defendant would rub the head of his penis up and down against her vagina, making skin-to-skin contact, and then try to penetrate her vagina. He was never

successful in penetrating her vagina because she would move or shift under him. During these incidents, defendant generally would hold his penis with one hand and hold her down with the other and continue until he ejaculated. A. answered "yes" when the prosecutor asked whether the lips of her vagina was "where [defendant] would rub his penis." Officer Moro testified that A. told him that defendant had rubbed his penis in her vaginal area and attempted unsuccessfully to penetrate her approximately 10 times.

Jurors reasonably could have inferred from the foregoing evidence that defendant's penis penetrated, however slightly, the lips of A.'s vagina as he attempted to penetrate her. Defendant's contention that the evidence gives rise to an inference that he rubbed his penis against only the outside of A.'s labia is, arguably, at odds with common sense and basic anatomy. But even assuming his alternative interpretation of the evidence is reasonable, that does not compel reversal. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 27 ["If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding"].)

B. Remand for Resentencing on Counts 1 and 2 Would be an Idle Act

In counts 1 and 2 defendant was convicted of oral copulation with a child 10 years of age or younger in violation of section 288.7, subdivision (b). The parties agree that the court was not required to impose consecutive sentences on counts 1 and 2. And they further agree that the court mistakenly believed that sections 667.6 and 269 mandated consecutive sentencing on counts 1 and 2. The parties dispute whether remand for resentencing is required, given the court's failure to appreciate the scope of its discretion. For the reasons below, we agree with the Attorney General that remand for resentencing is not necessary in the circumstances of this case.

1. Factual Background

At sentencing, the court stated its belief that it "must impose full consecutive sentencing in this case because these are forcible sexual offenses. But even if the court

were not required to do so, full consecutive sentencing is appropriate in this court's . . . point of view because each of these acts involves a separate act of violence on the same victim. [¶] They clearly occurred on separate occasions, with a different motivation to molest [A.] on yet another occasion, but they were separated by time and the molests that were charged in this case span over a period of years. I do find these are separate acts of violence that occurred on separate occasions against the same victim. [¶] And pursuant to [section] 667.6 and also [section] 269[, subdivision] (d), the statutes are clear that the court should impose full, consecutive sentencing in this case. And I want to emphasize, even if the court does have discretion . . . [to] impose [con]current sentencing, that is not appropriate in this case for the reasons I've indicated."

2. Analysis

Section 667.6, subdivision (d) requires that "[a] full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." Section 667.6, subdivision (e) does not specify oral copulation with a child 10 years of age or younger (§ 288.7, subd. (b)), the offense of which defendant was convicted in counts 1 and 2. Section 269, subdivision (c) requires the imposition of "a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."[3] Counts 1 and 2 did not "result[]in a conviction under" section 269. Accordingly, we agree with the parties that the court was mistaken in its belief that sections 667.6 and 269 required it to impose consecutive sentences on counts 1 and 2. That is, the court did not appreciate the scope of its sentencing discretion.

[3] The transcript indicates that the court referenced section 269, subdivision (d). There is no such subdivision; and only subdivision (c), which we discuss, addresses consecutive sentencing.

"[W]e nevertheless consider a remand here to be an idle and unnecessary, if not pointless, judicial exercise." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889 (*Coelho*).) The court twice stated that if it had the discretion to impose concurrent sentences it would nevertheless impose full, consecutive sentences. And the court noted the presence of factors supporting the imposition of consecutive rather than concurrent sentences, including that the crimes "occurred on separate occasions," each involved a "different motivation to molest [A.]," and they involved "separate acts of violence . . . ." (Cal. Rules of Court, Rule 4.425(a) ["[f]actors affecting the decision to impose consecutive rather than concurrent sentences include: [¶] . . . whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior"].) Under these circumstances, it is clear the court would impose consecutive sentences on counts 1 and 2 if we remanded the matter; therefore, we decline to do so. (*Coelho*, *supra*, at pp. 889-890 [declining to remand for resentencing where the trial court misunderstood the scope of its discretion because the court had "twice imposed 10 consecutive sentences and indicated that it would impose them even if some were not mandatory" and "the record reflect[ed] numerous grounds to support consecutive sentences"]; see *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 ["no purpose would be served in remanding for reconsideration" of sentence in light of retroactive Supreme Court decision determining that trial courts have discretion to strike Three Strikes prior convictions where "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence . . ."].)

C. Abstract of Judgment Error

The court orally imposed consecutive 15-year-to-life terms on counts 1, 2, 3, 5, and 6. As the parties agree, the abstract of judgment erroneously indicates that the court

imposed 25-year-to-life sentences on those counts. The record of the oral pronouncement of the court controls over the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we will order the abstract of judgment corrected to reflect that the court imposed consecutive 15-year-to-life terms on counts 1, 2, 3, 5, and 6.

III. DISPOSITION

The judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect the oral pronouncement of judgment. Specifically, the amended abstract of judgment should reflect that the court imposed consecutive 15-year-to-life terms on counts 1, 2, 3, 5, and 6. The superior court is further directed deliver a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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GROVER, J.

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